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6 IN THE UNITED STATES DISTRICT COURT
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8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 HARRY J. WILLIBY,

No. C-06-07385 EDL

10 Plaintiff,

**ORDER DENYING PLAINTIFF'S
MOTION TO STRIKE DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

11 v.

12 CITY OF OAKLAND, et al.,

13 Defendants.
14 _____/

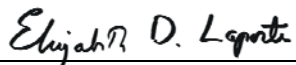
15 On January 28, 2008, Defendants filed a Motion for Summary Judgment to be heard on
16 March 4, 2008. On February 4, 2008, Plaintiff filed a Motion to Strike the motion for summary
17 judgment on the grounds that it was filed prematurely before the Court screened the First Amended
18 Complaint or ordered it served on Defendants under 28 U.S.C. § 1915.

19 Plaintiff misunderstands the application of 28 U.S.C. § 1915 to his First Amended
20 Complaint. That section applies to “. . . the *commencement*, prosecution or defense of any suit,
21 action or proceeding. . . .” 28 U.S.C. § 1915(a) (emphasis added). Shortly after this case was filed,
22 Judge Armstrong, who was previously assigned to this case, granted Plaintiff’s application to
23 proceed in forma pauperis, after which Plaintiff’s complaint was served on Defendants by the U.S.
24 Marshal’s Office. Section 1915(e) further requires the Court to dismiss a case filed under that
25 section “at any time if the court determines that the allegation of poverty is untrue; or the action or
26 appeal is frivolous or malicious; fails to state a claim on which relief can be granted or seeks
27 monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2).
28 Despite this ongoing duty, there is no requirement that the Court separately order service of an
amended complaint under the provisions of § 1915. In this case, the Court ordered that Plaintiff to

1 file an amended complaint simply substituting the name of a police officer for a Doe Defendant.
2 Plaintiff timely filed the First Amended Complaint, the Court accepted it for filing, Defendants
3 answered the First Amended Complaint and the Motion for Summary Judgment is directed at the
4 First Amended Complaint. Accordingly, Plaintiff's Motion to Strike is denied.

5 **IT IS SO ORDERED.**

6 Dated: February 11, 2008

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8 ELIZABETH D. LAPORTE
9 United States Magistrate Judge
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